Supreme Court, U. S.
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No. 78-1061

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD K. HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The question presented in this federal income tax case is whether the decision below correctly held that the Commissioner of Internal Revenue mailed a statutory notice of deficiency for 1968 in accordance with the requirements of Section 6212(b) of the Internal Revenue Code of 1954 to petitioner's residence.

The pertinent facts may be summarized as follows: During the period in question, petitioner resided at 5025 Warner Road, Westerville, Ohio. That address is also known as 5858 Edlor Drive. Petitioner conducted a medical practice at 1248 South High Street, Columbus, Ohio. In 1969, as a result of vandalism to his residence mailbox, petitioner removed the mailbox at his residence and advised the post office that he wished mail delivered to his office address. However, petitioner did not advise the Internal Revenue Service that he wished to receive mail at his office. On his 1968 income tax return and a waiver extending the period of assessment for 1968 to

December 31, 1972, petitioner listed his address as the Edlor Drive residence. Another waiver form extending the period of assessment to June 30, 1973, bore the Warner Road residence address (Pet. App. 4-6).

On June 14, 1973, the Commissioner mailed to petitioner a statutory notice of deficiency for the year 1968 at the Edlor Drive address. The post office returned the notice to the Internal Revenue Service with the notation "No Mail Receptacle. Order Expired 6-16-73." The Internal Revenue Service was unaware that the Warner Road address and the Edlor Drive address were for the same residence. As a result it sent a second identical notice to the Warner Road address on June 20, 1973. That notice was also returned to the Service marked "No Mail Receptacle. Order Expired" (Pet. App. 5).

The government thereafter brought this suit in the United States District Court for the Southern District of Ohio to reduce to judgment petitioner's assessed income tax liability for 1968 and 1969. The district court held that the Internal Revenue Service complied with the statutory requirements for sending notices of deficiency and entered judgment for the government in the amount of the assessments (Pet. App. 3-17). The court of appeals affirmed (Pet. App. 1-2).

The court below correctly held that the Commissioner of Internal Revenue complied with the requirement of Section 6212(b)(1) of the Code that a notice of deficiency be sent to the taxpayer's "last known address." It is well established that if such a notice is sent to the taxpayer's last known address it is valid even though the taxpayer does not actually receive it. *E.g., Luhring* v. *Glotzbach*, 304 F. 2d 556 (4th Cir. 1962); *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (2d Cir. 1959); *Commissioner* v. *Rosenheim*, 132 F. 2d 677 (3d Cir. 1942). Here, in accordance with the usual practice, the notice was sent to the address shown on petitioner's tax return for the year

in issue because the Internal Revenue Service was not aware of any other address. Indeed, as the district court found (Pet. App. 5, 6), during 1968-1973, petitioner used the Edlor Drive or Warner Road addresses in his correspondence with the Internal Revenue Service with respect to his taxable year 1968. Petitioner can hardly complain of his failure to receive the notice of deficiency because he is solely responsible for the nondelivery of the notice. Despite his removal of the mailbox from his residence, he continued to use his residence address in his correspondence with the Internal Revenue Service without informing that agency that his office address was his preferred mailing address. As the district court found, petitioner's use of various addresses in his dealings with the Service "served to obscure his desired mailing address rather than to clarify it" (Pet. App. 11). Accordingly, the decision below correctly ruled that the Commissioner sent the notice to petitioner's "last known address" as required by Section 6212(b)(1).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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[1]Petitioner now argues for the first time (Pet. 6, 8) that the Commissioner failed to send the notice of deficiency to his attorney-in-fact pursuant to instructions contained in a power of attorney on file with the Internal Revenue Service. But the record contains no such power of attorney and petitioner's briefs below makes no reference to any power of attorney.

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